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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALFONZO COLLIER,

Defendant and Appellant.

A141208

(Alameda County
Super. Ct. No. H52744)

Defendant Alfonzo Collier was convicted of aggravated sexual assault of a child by rape, rape, aggravated sexual assault of a child by sodomy, and incest. He now appeals, arguing he was denied his rights (1) to a speedy trial, (2) to a hearing on his *Marsden*¹ requests, and (3) to be personally present during various pretrial proceedings. We affirm.

I. BACKGROUND

Though chilling, the facts underlying defendant's criminal conduct are not important to the resolution of this appeal. In short, defendant sexually assaulted and raped his daughter on a number of occasions in Alameda and Sacramento counties.

On September 27, 2012, defendant was charged by information with one count of aggravated sexual assault of a child (Pen. Code,² § 269, subd. (a)(1)), one count of

¹ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

² All statutory references are to the Penal Code.

forcible rape (§ 261, subd. (a)(2)), and two counts of aggravated sexual assault of a child by sodomy (§ 269, subd. (a)(3)). All charges arose out of conduct in Alameda County.

Defendant appeared with counsel at an arraignment on November 27, 2012, and pleaded not guilty and personally waived his right to a jury trial within 60 days. Defendant did not appear in court at the following seven pretrial hearings held between December 19, 2012 and April 25, 2013, apparently due to clerical errors or errors on the part of the sheriff. Other than continuing the matter to a later date and setting a July 8, 2013 trial date, no other action was taken at these hearings. Defendant claims he was present at the next hearing held on May 7, 2013, though the clerk's transcript indicates he remained in custody at the time. Defendant was absent again at a May 9, 2013 hearing, at which time the court removed defense counsel and substituted in a public defender.

Defendant claims that, prior to the removal of his first attorney, he sent three letters to the court. The first is dated "2-3-013," but it is unclear from the record when the court actually received this letter because it is not stamped with a receipt date. In the letter, defendant states he asked his counsel to "get me a speedy trial," but counsel "ha[d] done nothing." Defendant requested the court hear his case, grant him a speedy trial, and replace his current counsel. The second letter is dated "2-25-13," but again no stamped receipt date appears on it. In this letter, defendant again asks the court to dismiss his attorney and set a speedy trial date. The third letter is dated "4-25-13" and was received by the court on May 1, 2013. In it, defendant requests an appearance before the court and the dismissal of his attorney.

On May 24, 2013, defendant appeared in court with his new defense attorney. Despite his prior letters to the court, there is no indication defendant invoked his speedy trial rights at this hearing. An amended information was filed, adding a new charge from Sacramento County for sexual assault of a child in violation of section 269, subdivision (a)(3), as well as a new sentencing enhancement under section 667.6, subdivision (d), which allows for imposition of a full, separate, and consecutive term for acts committed against the same victim on separate occasions.

On September 23, 2013, the court received a fourth letter from defendant, this time asking for the removal of the public defender assigned to his case because, among other things, he would not respond to defendant's speedy trial concerns. Defendant was present at a September 30, 2013 hearing. At the hearing, the court denied defendant's request to remove the public defender, finding counsel had made every effort to provide an adequate defense. The public defender appears to have withdrawn defendant's time waiver that day, when the district attorney filed an amended information.

The amended information filed on September 30, 2013, alleged counts for (1) aggravated sexual assault of a child in Alameda County (§ 269, subd. (a)(1)); (2) forcible rape in Alameda County (§ 261, subd. (a)(2)); (3) aggravated sexual assault of a child by sodomy in Sacramento County (§ 269, subd. (a)(3)); and (4) incest (§ 285) in Alameda County. The information also included a sentencing enhancement under section 667.6, subdivision (d) for acts committed against the same victim on separate occasions.

After several continuances, trial commenced on November 20, 2013. The jury returned a verdict on December 5, 2013, finding defendant guilty of all four counts charged. The court sentenced defendant to 36 years to life, consisting of two consecutive terms of 15 years to life for the two counts of aggravated sexual assault, plus a consecutive six-year term for the forcible rape charge, and a concurrent two-year term for the incest charge.

II. DISCUSSION

A. Speedy Trial

Defendant argues his due process right to a speedy trial was violated. Defendant concedes he initially waived the right to a speedy trial at his arraignment on November 27, 2012, but argues his later attempts to withdraw that waiver were ignored by his defense counsel and the trial court. Specifically, defendant points to the two letters he purportedly sent the trial court on February 3, and February 25, 2013, demanding a new attorney and a speedy trial.

We reject defendant's speedy trial argument. As an initial matter, it is unclear from the record how or when the February 3 and February 25 letters were received by the court. Though these letters are included in the clerk's transcript, they were not stamped as received by the trial court. Even if we assume the letters were received by the court sometime around February 2013, defendant failed to raise his speedy trial rights when he personally appeared in court on May 24, 2013, his first personal appearance since he waived time. Based on defendant's silence, the court could have reasonably assumed he no longer wished to withdraw his time waiver, especially since a new attorney had recently been assigned to his case.

To the extent there was a valid withdrawal of defendant's speedy trial waiver in February 2013, we would still decline to reverse. Under California law, "once a defendant has been tried and convicted, the state Constitution . . . forbids reversal for nonprejudicial error." (*People v. Johnson* (1980) 26 Cal.3d 557, 575.) Prejudice may be demonstrated "by loss of material witnesses due to lapse of time or loss of evidence because of fading memory attributable to the delay." (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911.) Here, defendant has shown no such prejudice. Defendant argues the delay allowed the prosecution to add another sexual assault charge from Sacramento County and a new sentencing allegation under section 667.6, which increased his punishment. However, defendant's contention that the prosecution would not have been able to bring these new charges had the trial been set for an earlier date is pure speculation. Had the prosecutor been aware of defendant's attempts to withdraw his time waiver, and it is not clear she was, she might have amended the information earlier. She could have done so at any time prior to the verdict. (*People v. Farrow* (1982) 133 Cal.App.3d 147, 152.) Moreover, even if the charges against defendant had been dismissed on speedy trial grounds, the prosecution could have refiled them.³ (*Crockett v. Superior Court* (1975) 14 Cal.3d 433, 439–440.)

³ Defendant's citation to Florida case law on this point is also unavailing. Even if Florida law had any application here, both cases cited by defendant involved a motion to dismiss an amended information filed after the speedy trial period had expired. (*State v.*

Under the federal Constitution, we must employ a four-part balancing test to determine whether speedy trial concerns warrant reversal: (1) the length of the delay, (2) the reason for the delay, (3) defendant's assertion of the right to a speedy trial, and (4) prejudice resulting from the delay. (*Doggett v. United States* (1992) 505 U.S. 647, 651 (*Doggett*)). Here, the delay was not uncommonly long. Defendant was tried less than a year after his arraignment, and only a few months after he purportedly sent his first letter to the court demanding a speedy trial. As to the second and third factors, defendant initially waived his speedy trial rights, and he did not raise the issue in court until September 30, 2013, less than two months prior to trial. Though some of the delay was also due to negligence in transporting defendant to the courtroom on hearing dates, which may have prevented defendant from raising the issue earlier, as discussed above, no discernable prejudice flowed from the delay.

Quoting from the United States Supreme Court's decision in *Doggett*, defendant argues "prejudice is not limited to the specifically demonstrable." (*Doggett, supra*, 505 U.S. at p. 655.) The thrust of the court's discussion, however, was that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove" because time's erosion of exculpatory evidence is hard to show. (*Id.* at pp. 655–657.) In this case, the delay was less than a year and was not excessive under the circumstances. In any event, as some of the misconduct charged occurred over a decade ago, it is unlikely any additional evidence was lost in the months between the filing of the information and the commencement of trial. (See *People v. Sanford* (1976) 63 Cal.App.3d 952, 962 ["If the witnesses' memories were dulled by the passage of time, that process must have begun long prior to the 90-day period preceding the filing of the complaint."].) Nothing in *Doggett* or the other authority cited by defendant suggests we should presume prejudice based only on a delay of nine months (assuming the court

Conroy (Fla.Dist.Ct.App. 2013) 118 So.3d 305, 311; *State v. Clifton* (Fla.Dist.Ct.App. 2005) 905 So.2d 172, 174.) In contrast, in this action, defendant did not move to dismiss the charges against him on speedy trial grounds, but waited until after he had been tried and convicted.

received defendant's letter concerning his time waiver in February 2013), and the filing of an amended information.

B. Defendant's Marsden Requests

Defendant asserts his February 3, and February 25, 2013 letters to the trial court should be construed as *Marsden* requests for new counsel, and the trial court violated his due process rights by failing to hold a timely hearing on those requests. Under *Marsden*, when a criminal defendant requests new counsel based on a claim of inadequate representation, the court must hold a hearing to provide the defendant with an opportunity to explain the basis for the request. (*Marsden, supra*, 2 Cal.3d at pp. 123–124.) Denial of a *Marsden* request is reviewed for an abuse of discretion, and may not be overturned unless the defendant shows failure to grant relief substantially impaired his or her right to assistance of counsel. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

We find no error. Defendant did request new counsel in his February 3 and February 25 letters, and the trial court did not provide defendant an opportunity to personally explain his concerns, but the trial court also granted defendant the relief he requested. Specifically, on May 9, 2013, the trial court relieved defendant's attorney, and appointed a new one. The court's decision to grant defendant's request without a hearing did not violate defendant's right to counsel or otherwise impair his constitutional rights. Defendant contends he was prejudiced because the court's failure to hold a hearing somehow violated his right to a speedy trial. We fail to see the connection, other than defendant may have had an additional opportunity to demand a speedy trial had he been brought before the court on a *Marsden* request. In any event, as discussed above, any delay in defendant's trial did not violate his rights under the federal and state Constitutions since it did not prejudice defendant.

C. Defendant's Absence at Pretrial Hearings

Defendant claims his due process rights were violated because he was not personally present at eight pretrial hearings held between December 19, 2012 and May 9, 2013. We disagree.

Pursuant to the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment, a criminal defendant has a right “to be present at any stage of the criminal proceedings ‘that is critical to its outcome if his presence would contribute to the fairness of the procedure.’ ” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1356–1357.) “Defendant has the burden of demonstrating that his absence prejudiced his case or denied him a fair trial.” (*Id.* at p. 1357.) Likewise, under California law, a person charged with a felony must be personally present at the arraignment, at the time of plea, during the preliminary hearing, during those portions of the trial when evidence is taken before the trier of fact, and at the time of the imposition of sentence. (§ 977, subd. (b)(1).) At all other proceedings, the defendant must be present unless he or she has executed a written waiver. (*Ibid.*) Lack of a valid waiver is “nonprejudicial in situations where [the defendant’s] presence does not bear a ‘reasonably substantial relation to the fullness of his opportunity to defend against the charge.’ ” (*People v. Garrison* (1989) 47 Cal.3d 746, 782.)

The hearings at issue here were not critical to the outcome of the criminal proceedings. Nor would defendant’s presence have contributed to the fairness of the proceedings or allowed him to better defend against the charges. At almost all of these hearings, the court did nothing other than continue the proceedings to a later date. Only two matters of substance were taken up during the hearings at issue: the court set a trial date of July 8, 2013, and at defendant’s request, it appointed new defense counsel. It is unclear how defendant’s presence would have affected the adjudication of either of these matters.

Defendant argues his absence from these proceedings prevented him from withdrawing his time waiver and asserting his right to a speedy trial. However, as discussed above, the delay in the commencement of trial did not prejudice defendant and thus did not impair his constitutional rights.

III. DISPOSITION

The judgment is affirmed.

Margulies, J.

We concur:

Humes, P.J.

Banke, J.